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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

OSCAR PERALTA-ROMERO,

Defendant - Appellant.

No. 02-16190

D.C. No. CV-01-00353-RCC
CR-98-00821-RCC

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Submitted September 12, 2003**
Pasadena, California

Before: BEEZER, FISHER, Circuit Judges, and ENGLAND,*** District Judge.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.

The United States appeals the district court's order granting Oscar Peralta-Romero's motion pursuant to 28 U.S.C. § 2255 and the district court's subsequent resentencing of Peralta-Romero from sixty to forty-six months. We affirm the district court's order granting Peralta-Romero's § 2255 motion and its judgment resentencing Peralta-Romero to forty-six months in prison.¹

I

The government argues that Peralta-Romero's failure to raise a claim under *Apprendi v. New Jersey* on direct review procedurally defaulted the claim. The claim was not procedurally defaulted. *See English v. United States*, 42 F.3d 473, 477-478 (9th Cir. 1994).

II

We have held that the sentencing range for a defendant found guilty of a crime involving an unspecified amount of marijuana in violation of 21 U.S.C. §§ 841(a) and 846 is zero to five years pursuant to § 841(b)(1)(D) and that exposure to the imposition of five to forty years under § 841(b)(1)(B) amounts to *Apprendi* error. *United States v. Velasco-Heredia*, 319 F.3d 1080, 1085 (9th Cir. 2003). The district court noted that Peralta-Romero's co-defendant was convicted under

¹ Because the parties are familiar with the facts we recite them here only as necessary to explain our decision.

essentially the same circumstances as Peralta-Romero, except that the co-defendant was resentenced in light of *Apprendi*. The sentencing range for Peralta-Romero's co-defendant was thirty-seven to forty-six months. Because Peralta-Romero was sentenced under § 841(b)(1)(B), rather than § 841(b)(1)(D), he received a sentence of sixty months. This error was harmful. The district court properly granted Peralta-Romero's § 2255 motion to resentence on the basis of the *Apprendi* error.

III

The government contends that the district court does not possess the inherent power to grant a new sentencing hearing. Under 28 U.S.C. § 2255, a prisoner can move the sentencing court to set aside or correct a sentence which “was imposed in violation of the Constitution or laws of the United States, or . . . in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” After the district court determined that Peralta-Romero's motion successfully met § 2255's standards the district court's inherent authority to sentence was broad and flexible. *See United States v. Handa*, 122 F.3d 690, 691 (9th Cir. 1997). We affirm the district court's judgment reducing Peralta-Romero's sentence.

AFFIRMED.